

**EASTERN SIERRA UNIFIED SCHOOL DISTRICT**

California Public Employment Relations Board

**Robert J. Maden, Charging Party, v. Eastern Sierra Unified School District,  
Respondent.**

Docket No. S-CE-395

Order No. 312

May 24, 1983

Before Gluck, Chairperson; Tovar and Morgenstern, Members

**Interference -- Right To Representation -- Grievance Hearing -- -- 47.31, 72.18** Bus driver employed by school district was entitled to union representation at grievance hearing, concerning his termination, where district, having acceded to driver's request for hearing, was estopped from denying his right to union representation. Moreover, driver was entitled to hearing under district policy, which granted such right regardless of employee's alleged probationary status. Since, district's administrative procedures for resolution of employment disputes were within meaning of "employment relations" under EERA, employee had right to union representation under such procedures.

**APPEARANCES:**

M. Susan Carter, Attorney for Robert J. Maden; Bret H. Reed, Jr., Deputy  
County Counsel for the Eastern Sierra Unified School District.

**DECISION**

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Robert J. Maden (Charging Party) to portions of a hearing officer's proposed decision and order [see 6 PERC 13009 (1981)]. The hearing officer found that the Eastern Sierra Unified School District (District) violated subsections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)1 by denying Charging Party the right to representation by the Eastern Sierra Classified Employees Association (Association) at a grievance hearing following his termination. He ordered the District to provide a hearing with an Association representative present to consider the termination and any procedural irregularities related thereto. The hearing officer dismissed all other allegations.

The District filed no exceptions.

Charging Party excepts to the hearing officer's factual finding that he was a probationary employee at the time of his termination, and to the hearing officer's refusal to order reinstatement to his former position with back pay.2

The Board finds the hearing officer's findings of fact to be free from prejudicial error and, except for the finding as to Charging Party's probationary status, which is discussed herein, adopts them as the findings of the Board itself.3

**DISCUSSION**

The District's sole defense to this charge was that Maden had no right to a hearing and, therefore, no right to representation.4 Rejecting the District's argument, the hearing officer found that Maden had a right to representation at the November 18 meeting with the District board because:

(1) even if his termination was not grievable under the contract between the District and the Association, at all times prior to the formal hearing the District treated the matter as a grievance; and (2) the District Community Relations Policy about which Maden complained applied to all employees in the unit and created an independent right to a hearing.

We agree. Because the District treated Charging Party's complaint as a grievance under the contract,<sup>5</sup> it was estopped, at the grievance hearing, from denying his right to representation expressly provided in the contract.<sup>6</sup> Thus, a right to representation accrued to Charging Party by virtue of his membership in the bargaining unit represented by the Association, which expressly includes both "probationary and permanent employees" (except designated confidential, supervisory or managerial positions). Secondly, District Community Relations Policy 1312 provides that "the employee involved may request an executive session of the Governing Board for the purposes of fuller study and a decision by this body."<sup>7</sup> Thus, the policy itself creates a right to hearing and, by its terms, applies to an "employee" without qualification as to permanent or probationary status.

We affirm the hearing officer's conclusion that pursuit of such administrative remedies is sufficiently similar to grievance processing to be considered within "employment relations" to which the right of representation attaches.<sup>8</sup> Moreover, we find that both under the contractual grievance procedure and under District policy 1312 Maden had a right to representation at the November 18 hearing regardless of whether he was a permanent or a probationary employee. This being the case, no finding on this employee's status as a permanent or probationary employee is required and we make none.<sup>9</sup>

## **REMEDY**

Charging Party excepts to the hearing officer's denial of his requested remedy of reinstatement to his former position with back pay. The hearing officer's denial of reinstatement was not predicated solely on his finding that Maden was a probationary employee at the time of his termination. To the extent it was, we disavow the hearing officer's rationale.<sup>10</sup>

However, the hearing officer's decision was also based on the fact that Charging Party did not allege or prove that his termination was unlawful under EERA. The charge and the findings herein go only to the denial of representation at a hearing subsequent to his dismissal. No claim of the right to a hearing prior to dismissal is raised. If the hearing with benefit of representation ordered herein results in a determination that Charging Party was wrongfully terminated, reinstatement and back pay could be effected at that time. But, at this time, there has been no finding of an unlawful deprivation of the job itself. Therefore, a remedy of reinstatement and back pay is not now appropriate.<sup>11</sup>

We, therefore, affirm the hearing officer's proposed order.

## **ORDER**

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The Eastern Sierra Unified School District and its representatives shall:

### **A. CEASE AND DESIST FROM:**

Denying Robert J. Maden his right to representation or denying the Eastern Sierra Classified Employees Association the right to represent its members as guaranteed by subsections 3543.5(a) and (b) of the Educational Employment Relations Act.

### **B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS WHICH ARE NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:**

1. Extend to Robert J. Maden an opportunity for a hearing, with Association representation present, on determination of the rescission of his termination.

2. Within five (5) workdays of the date of service of this Decision, post copies of the attached Notice at all school sites and other work locations where notices to classified employees customarily are placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that these Notices are not reduced in size, altered, defaced, or covered by any other material.
  3. Within thirty (30) workdays of the date of service of this Decision notify the Sacramento regional director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the Charging Party herein.
- Member Tovar Joined in this Decision.

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**1** The EERA is codified at Government Code section 3540 *et seq.* All statutory references are to the Government Code unless otherwise noted.

Section 3543.5 provides, in pertinent part:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

**2** Because these are the only exceptions raised, our discussion is so limited and we make no comment on other conclusions of law as appear in the hearing officer's proposed decision.

**3** We note an apparent clerical error at p. 8 of the proposed decision, where the date of the hearing is given as December 18 instead of November 18. This error is not prejudicial in nature.

**4** The District never advanced the theory relied on by the chairman in his dissenting opinion that if Maden had a right to representation, the District had not denied that right. Pursuant to PERB regulation 32300(c) (California Administrative Code, title 8, section 32300(c)), "An exception not specifically urged shall be waived."

**5** Specifically, the hearing officer found as follows at pp. 20-21 of the proposed decision:

[I]n response to his request [for a hearing], the District granted him a hearing before the Board, outlined to him that it was bypassing intermediate steps within the grievance procedure, and going directly to the Board with his problem; and finally the District asserted that the hearing granted, was "the hearing guaranteed employees . . . under the contract . . . ." After the hearing, Maden was advised by Binderup that his grievance had been denied, and later, counsel for the District confirmed with Maden that the decision of the Board had been related to him in conformity with the provisions of the grievance procedure.

**6** Article VIII of the contract, entitled "Grievance," provides:

The employee and immediate supervisor shall have the right to include in the grievance hearings such witnesses as they deem necessary to develop facts pertinent to the grievance . . . . Such witnesses shall be in addition to the conferee that either party may select.

A "conferee" is defined in that Article as:

[A]ny association representative selected by the grievant to assist the employee in presenting and processing the claimant's grievance, except as limited in Level I of this procedure.

**7** District Policy 1312 provides, in pertinent part:

#### COMMUNITY RELATIONS

##### *Complaints Concerning School Personnel/Instructional Materials*

Constructive criticism of the schools is welcome through whatever medium when it is motivated by a sincere desire to improve the quality of the educational program and to equip the schools of the district to perform their task more effectively.

The Governing Board places trust in its employees and desires to support their actions in such a manner that employees are freed of unnecessary, spiteful, or negative criticism and complaints.

Whenever a complaint is made directly to the Governing Board as a whole, it shall be referred to the school administration for study and possible solutions. The individual employee involved shall be advised of the nature of the complaint and shall be given every opportunity for explanation, comment, and presentation of the facts as he/she sees them.

If it appears necessary, the administration, the person who made the complaint, or the employee involved may request an executive session of the Governing Board for the purposes of fuller study and a decision by this body. Generally all parties involved, including the school administration, shall be asked to attend such a meeting for the purposes of presenting additional facts, making further explanations, and clarifying the issues. Hearsay and rumor shall be discounted as well as emotional feelings except those directly related to the facts of the situation.

The Governing Board shall conduct such meetings in as fair and just a manner as possible. The Governing Board may request a disinterested third party to act as a moderator to help it reach a mutually satisfactory solution.

**8** Section 3543.1 provides, in pertinent part:

Employee organizations shall have the right to represent their members in their employment relations with public school employers, . . .

Section 3543 provides, in pertinent part:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

See *Mount Diablo Unified School District et al.* (12/30/77) EERB Decision No. 44, 2 PERC 2048; *Rio Hondo Community College District* (12/28/82) PERB Decision No. 272, 7 PERC 14028. Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

**9** Because we sustain Charging Party's exception on this ground, we need not consider his additional arguments that the finding of probationary status is not supported by sufficient

evidence in the record and that the finding requires interpretation of the Education Code beyond PERB's jurisdiction.

**10** We note that even if Charging Party were found to be a probationary employee, that finding would not necessarily preclude a remedy of reinstatement and back pay if the termination is found to have been an unlawful violation of due process. *Wilkerson v. City of Placentia* (1981) 118 Cal.App.3d 435 [173 Cal.Rptr. 294]; *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340 [159 Cal.Rptr. 440]; *Fugett v. City of Placentia* (1977) 70 Cal.App.3d 868 [139 Cal.Rptr. 123]. Inasmuch as in this case PERB is empowered to interpret and enforce only the provisions of EERA, this constitutional question is one for judicial determination and is not properly before us. See *Modesto City Schools* (3/8/83) PERB Decision No. 291, 7 PERC 14090; *Richmond Unified School District/Simi Valley Unified School District* (8/1/79) PERB Decision No. 99, 3 PERC 10105.

**11** See *Lemoore Union High School District* (12/28/82) PERB Decision No. 271, 7 PERC 14026, where the Board declined to order the promotion with back pay of an employee who was unlawfully denied the opportunity to compete for the promotional appointment on a fair and equal basis. There, our remedy was limited to an order directing the District to re-open the selection process and provide the employee a full and fair opportunity to be appointed. The remedy was so limited because there was no finding of an unlawful deprivation of the job itself and no evidence that, had she been given a fair opportunity, she would have been appointed.

Similarly, reinstatement and back pay are inappropriate here where there is no finding, or even any allegation, that Maden was unlawfully deprived of his job, and no evidence that, had he been represented at the hearing, the school board would have reached a different decision.

Gluck, Chairperson, dissenting: The District has filed no exceptions to the hearing officer's finding that it violated the Act by denying Robert Maden the right to be represented at a hearing conducted by the school board to consider his dismissal from employment. However, the purposes of the Act would not necessarily be effectuated by a Board order which runs against the grain of the facts.<sup>1</sup> Furthermore, the exception filed by the charging party brings into focus the entire question of his right to representation, as the majority acknowledges although reaching a different result.

The complaint should be dismissed. I agree with the majority's conclusion that Maden was entitled to be represented in the hearing before the school board. However, I do not find that he was actually denied that right. I do not know what uncharted "theory" the majority finds in these words (p. 3, fn. 4). The single question raised by the charge is whether Maden was denied representation at his disciplinary hearing. The *facts*, found by the hearing officer, adopted by the majority and not excepted to by charging party, are that Maden was allowed representation at that hearing and so notified the Association which promised to appear but did not until after Maden's matter had been reached and concluded.<sup>2</sup> That the District refused to grant a continuance at that time does not alter these facts. The hearing officer had earlier considered these facts and concluded: "It cannot be said that either Maden or the Association had the right to continue the matter for the convenience of either." He then bridged the gap between this statement and his following conclusion that the District "could not condition [Maden's appearance at the hearing] upon the absence of representation" by the statement: "... the [school] board proceeded with the hearing without any compelling reason to do so." The issue is not whether the board had a compelling reason to proceed but whether it was legally obligated to grant a continuance.

Perhaps the school board was unnecessarily dogmatic in rejecting Maden's last-minute request for a continuance, but its refusal to postpone the matter, or to reopen it when the representatives

finally did appear, constitute neither "conditioning" Maden's discussion on the absence of representation nor an unlawful denial of statutory rights.<sup>3</sup>

I disagree with the majority's interpretation of *Lemoore, supra*. There the Board ordered a new examination for an employee who had been unlawfully discriminated against on a promotional test. It declined to order that she be given the promotion because there was no evidence that she would have been successful had she not been discriminated against. Thus, *Lemoore* followed the standard policy of remedying an unfair practice by ordering a return to the status quo - the opportunity to participate in a fair and impartial examination. Here, the remedy ordered by the hearing officer and affirmed by the majority does not restore the status quo - Maden's employment. Accepting solely for purposes of this discussion the majority's finding that Maden was denied representation, a reinstatement order would recognize that he was effectively denied the opportunity to prevent the dismissal decision ultimately reached by the school board.

I suggest that the majority misses the point of status quo relief (p. 8, fn. 11). True, there was no evidence that the *Lemoore* grievant would have been promoted had she been given a fair examination. But it requires no speculation to find that Maden was employed before his dismissal and that the District policy in question provides for a hearing *before* a dismissal decision is made.<sup>4</sup> Thus, Maden was "convicted" before he was tried. The majority does order a new trial because he was denied counsel but finds it inappropriate to vacate the terminal sentence that was imposed.

Nevertheless, I do not suggest that reinstatement is required in every instance where representation is denied. PERB has the discretion to order such remedies it believes would effectuate the Act's purposes. Absent evidence of special circumstances requiring reinstatement, such as irreparable harm to statutory rights, an order for a new hearing might well be sufficient.

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<sup>1</sup> Board rule 32300(c) which provides that an exception not specifically urged shall be waived, does not preclude this Board, the statutory body responsible for adjudicating allegations of violations of law, from conducting a *de novo* review.

<sup>2</sup> Instead, the representatives had first attended a private affair. Charging party filed no exceptions to these findings of facts by the hearing officer. Nor did it take exception to his findings that Maden has received advance notice of the new date for his hearing, had so notified the Association at least four days prior thereto and that neither Maden nor the Association had made a pre-hearing request for a continuance.

<sup>3</sup> My colleagues' concern with my raising the matter "waived" by the District is surprising considering that their decision deals largely with a matter to which neither party excepted - Maden's right to representation. Indeed, the only exceptions on appeal were Maden's objections to the hearing officer's failure to decide whether he was a permanent or temporary employee (an exception the majority declines to consider) and to his failure to order reinstatement.

The plain fact is that the charging party, by its own testimony, disproved the charge that Maden was denied representation at his hearing. The complaint should have been dismissed. It is true that the District, for whatever reasons of its own, has not raised this point in response to Maden's appeal (although it did, in its post-hearing brief, argue that it had authorized him to be represented). But Maden, by his appeal, has opened the record. Maden opened the door and the majority should not be distressed that I chose to enter.

<sup>4</sup> Maden had no opportunity prior to the school board hearing to protest his dismissal since the District eliminated the preliminary steps of the grievance procedure.

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